Supreme Court, U.S.
FILED
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SPANIOL, JR.
CLERK

87 - 1153
No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

ROSEE TORRES, d/b/a LEGAL SECRETARIAL SERVICES, LTD., TELEPHONE SECRETARIES UNLTD., DOCTORS HELPER and ATTORNEYS HELPER,

Petitioner,

v.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois Corporation, AMERICAN TELEPHONE & TELEGRAPH INFORMATION SYSTEMS a/k/a AMERICAN TELEPHONE & TELEGRAPH CO., INC., A/K/A AT&T, a New York Corporation and AT&T INFORMATION SYSTEMS, INC. a/k/a AT&T-IS, INC. a/k/a AT&T-IS, a Delaware Corporation,

Respondents.

APPENDIX

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PRO SE
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Chicago, Illinois 60606
(312) 263-0757

52 pp

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APPENDIX 1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT, EASTERN DIVISION

TORRES V. BELL, AT&T and AT&T-IS 86 C 1718

MINUTE ORDER - JUDGE GRADY - JULY 8, 1987

MOTION

(1)Plaintiff (2) Motion to file Second Amended Complaint Instanter naming defendant, AMERICAN TELEPHONE & TELEGRAPH INFORMATION SYSTEMS, INC., a Delaware Corp., and (3) Plaintiff's Motion for Default Judgment against defendant AMERICAN TELEPHONE & TELEGRAPH CO., a New York Corporation, for failing to appear, answer or otherwise plead.

ORDER

Plaintiff's Motion for Default Judgment against American Telephone & Telegraph Co., a New York Corp., is hereby denied. Pursuant to Rule 11, the court finds that the said motion has been filed frivolously and in bad faith. The Court will assess $300.00 against Plaintiff to be paid to American Telephone & Telegraph Information Systems, Inc. within 10 days of entry of this Order. (NR-102)

APPENDIX 2

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT, EASTERN DIVISION

TORRES V. BELL, AT&T and AT&T-IS 86 C 1718

MINUTE ORDER - JUDGE GRADY - July 15, 1987

MOTION

(None on Record)

ORDER:

Enter Order correcting the Court order dated July 8, 1987 to read "the sanctions of $300.00 are to be paid to AT&T Information Systems, Inc." Remainder of Order to stand.

(NR-107)

1/ Note that Respondent AT&T Information Systems, Inc.(EX.2) was not added as a party until July 8, 1987 (NR-102) after Petitioner's discovery that they were not the same entity as the New York Corp. (EX.1) as Petitioner was led to believe. Further, this party (same as A-1) was not the subject or party of Petitioner's Motion for default as District Court indicated in its Memo. Op.

APPENDIX 3

UNITED STATES DISTRICT CO

NORTHERN DISTRICT, EASTERN DIVISION

TORRES V. BELL, AT&T & AT&T-IS,JULY 22,1987

TRANSCRIPT OF PROCEEDINGS, LAURA BRENNAN

TORRES: But for the record, Your Honor, I want to tell you this default judgment that I have is not against the company that she (Pamela Hanebutt, Sidley & Austin) represents; it is against the New York Company. It isnot against her company at all.

THE COURT: I understand, but she was nonetheless, required to respond to the motion.

TORRES: Okay.

THE COURT: I want you to have your stay pending appeal if this is an appealable order. Now, whether it is an appealable order, I don't know. I think it is, but I am not 100 percent sure. (pp.7, lines 22-24;

pp. 8, lines 1-10.

Marty, insteadof having a supersedea, Miss Torres will simply pay the money, but the understanding is that if it is reversed, you give the $300 back. Now, the petition for

interlocutory appeal, that is all also here.

I am not going to certify this for an appeal under Section 1292,because I don't think it falls within that rationale. In other words,this isn't something that is going to shorten the litigation. So this isn't a proper order for certification pursuant to that statute. That does not mean that you don't have an appealable order. I tend to think it is on the basis that it is collateral to the litigation and it is final unless reversed. p.9, lines 16-25;p.10,lines 1-6.

THE COURT: I will deny the petition for interlocutory appeal only because I believe that the conditions of 28 U.S.C., Section 1292 are not met, but I express no opinion on the question of whether this is an otherwise appealable order. (p.10, lines 16-20)

Judge Grady

APPENDIX 4

UNITED STATES COURT OF APPEALS

SEVENTH CIRCUIT

TORRES V. BELL, AT&T & AT&T-IS 87-8042

Hon. William J. Bauer, Chief Judge

Hon. Walter J. Cummings,Circuit Judge

Hon. Michael s. Kanne, Circuit Judge

PETITION

Petitioner's "Petition for Permission to Appeal Pursuant to 28 U.S.C., 1292 and Petition for Interlocutory Appeal filed July 16, 1987

ORDER

This matter comes before the Court for consideration upon the "Petition for Interlocutory Appeal" filed herein on July 16, 1987. The order that is the subject of this Petition has not been certified for Interlocutory appeal under 28 U.S.C., Sec. 1292(b) by the District Court. Accordingly,

IT IS ORDERED that said motion is DENIED.

July 24, 1987

APPENDIX 5

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT, EASTERN DIVISION

TORRES V. BELL, AT&T & AT&T-IS JULY 31,1987

MINUTE ORDER - JUDGE GRADY- 86-C 1718

MOTION

The minute order form does not indicate, but this is Court's answer to Respondents' Motion to Dismiss and Motion for Summary Judgment of August 8, 1987 (NR-81,82)

ORDER

Enter Memorandum Opinion. Counts V-XI of the Complaint are dismissed for failure to state a claim under Rule 12(b)(6). Counts I-IV are dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). Plaintiff is given leave to file an amended complaint alleging race discrimination under 42 U.S.C., Sec. 1981 or 1982. **(NR-138)**

APPENDIX 6

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT, EASTERN DIVISION

TORRES V. BELL, AT&T and AT&T-IS 86 C 1718

JUDGE GRADY (NR-138) JULY 31, 1987

MEMORANDUM OPINION

This case is before us on separate motions of the two defendants. Defendant Illinois Bell Telephone Company ("Bell") moves for summary judgment against pro se plaintiff Rosee Torres ("Torres"). Defendant AT&T Information Services, Inc. ("AT&T-IS") moves to dismiss Counts II-XI of plaintiff's Second Amended Complaint ("Complaint") for failure to state a claim. For the reasons stated below, the complaint is dismissed as to both defendants: Counts V-XI are dismissed for failure to state a claim under federal law and Counts I-IV are dismissed for lack of jurisdiction.

FACTS AND PROCEDURAL SETTING

Plaintiff Torres is the sole proprietor of a telephone answering service known as "Legal Secretarial Services, Ltd., Telephone Secretaries Unltd., Attorneys Helper,

and Doctors Helper," all located in Chicago. Complaint, Count 1 at Para.2. She alleges that in 1970 she entered into a contract with Bell for the "manufacture, leasing, and installation," of four telephone answering switchboards to be used in her business. Id. at Para.7 In January 1984, pursuant to the court ordered divestiture of the Bell System, Bell assigned its rights under the contract to AT&T-IS.[1] Id. at Para. 10. Shortly afterward, both Bell and AT&T-IS informed plaintiff that they had ceasedmanufacture of the switchboards and no longer had access to parts for their maintenance. However, they told plaintiff that the lease contrcts would remain in effect until 1992. Id. at Para. 11. Plaintiff contends that defendants refused to service the switchboards effectively despite her requests and that this hurt her business. Id. at Para. 12-14.

In the first four counts of the complaint, which are based upon state law, plaintiff maintains taht the actions of defendants constitute a breach of contract (Count 1). She

also alleges that the defendants used economic coercion and extortion to induce her to terminate the contract (Count II); that defendants'"knowing and reckless" damaging of the switchboards "tortiously interfered with plaintiff's leased equipment" (Count III); and that defendants defrauded her (Count IV). The next six[2] counts allege violations of federal law and will analyzed in detail in the next section.

AT&T-IS has moved to dismiss all but Count I of the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Bell has moved for summary judgment pursuant to Rule 56, stating that plaintiff's controversy is exclusively with AT&T-IS and that any complaint against Bell is within the exclusive jurisdiction of the Illinois Commerce Commission. Bell also contends that the complaint fails to state a federal cause of action. Bell's Motion for Summary Judgment at 1. (End of Page 2)

As outlined below, we agree with both defendants that plaintiff has failed to state a federal claim in Counts V-XI of the complaint and we will dismiss those counts with prejudice under Rule 12(b)(6), with the exception of count X, which we allow her to amend to state a cause of action under 42U.S.C., Sec. 1981 or 1982. Because we find that complete diversity is lacking among the parties, we will dismiss the state law claims as well unless plaintiff amends her complaint to state a federal claim.[3]

DISCUSSION

Federal Claims

1. Antitrust(Sherman Act)-Count V

In Count V, plaintiff alleges that defendants violated the Sherman Act, 15 U.S.C., Sec. 1, by coercing and enforcing a "tying arranggement to the contract" whereby plaintiff was reuired to purchase both a long and a short-term maintenance and service agreement as a condition of the lease, even though such service would no longer be offered, and the defendants were unable to

perform under such terms." Count V, para. 18. Plaintiff also seems to allege that defendants' conditioning of new contracts and equipment upon her keeping up service payments constitutes an illegal tying arrangement. Id. at para. 19.

A tying arrangement violative of the Sherman Act occurs when a buyer is permitted to purchase a desired (tying) product only if he agrees to buy a second, generally unwanted (tied) product from the seller. KFC Corp. v. Marion Key Co., Inc., 620 F. Supp. 1160, 1169 (S.D.Ind.1985). The "tied" product, alleged here to be the service on the switchboards, must be in a distinct market from the "tying" product, alleged here to be the lease of switchboards. See Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2,21 (1984). (End of Page 3)

Defendants argue that only one product--the lease of switchboards--is involved in this instance. We agree. AT&T-IS leases the switchboards to plaintiff, as did Bell prior toBell prior to 1984; the plaintiff

did has not not purchased the equipment. Leasing equipmentand then serving it are not two separate "products" for antitrust purposes; rather, the service requirement is a valid condition of the single lease contract. Because the defendants have an interest in maintaining equipment that they still own, maintenance is provided to benefit the defendants, not the plaintiff. Cf. McGee v. First Federal Savings and Loan Ass'n., 761 F.2d 647 (11th Cir. 1985).

Indeed, the rest of the allegations in Count V reinforce the notion that this count of the complaint is merely a restatement of plaintiff's central cause of action, the breach of the agreement by the defendants to lease and maintain working switchboards. She alleges that she was not allowed to rescind any specific contract with the defendants without being regarded as in violation of all her other contracts with them. Count VI at Para. 19. This "tying" of separate contracts does not lead to antitrust liability, however, as there is no indication that the separate

contracts were for separate product with separate markets. It seems that plaintiff wanted to end the contracts on non-functioning switchboards while keeping the others.Plaintiff adds that the "tying arrangements" are "unilateral and represent gross modifications of the original contractual/leasing arrangement." Id. at Para. 24. Again, the plaintiff complains about a breach of a contract rather than a violation of antitrust law. See Snellman v. A.B. Dick Co., No. 81 C 3048, Memorandum Op. at 13-14 (N.D. Ill. march 20, 1987)(Grady, J.)

In her memoranda opposing the defendants' motions, plaintiff makes several wholly new allegations to support her antitrust claim.It is axiomatic that (End of Page 4) the complaint may not be amended by the briefs in opposition to a motion to dismiss. Car Carriers, Inc. v. Ford Motor Co., 745 F. 2d 1101, 1007 (7th Cir. 1984).However, even if the new allegations in the memoranda were incorporated into plaintiff's complaint,[4] they would not be sufficient to defeat dismissal. Plaintiff alleges an unlawful tie exists

between the leasing of switchboards and the "hundreds of separate product markets" found in the use of phone lines and numbers assigned by Illinois Bell. Plaintiff's Response to AT&T-IS' Motion at 10-11; Plaintiff's Response to Bell's Motion at 17-18.[5] However, no separate product market exists for telephone lines and numbers, Asplaintiff has alleged in her complaint, Bell has a government sanctioned monopoly in providing local phone numbers. Count 1 at Para. 16. Because no competitive market exists for this allegedly "tied" product, this connection cannot be the basis of an antitrust violation. Cf. Nordic Bank PLC v. Trend Group, Ltd. 619 F. Supp. 542, 559 (S.D.N.Y. 1985).

Plaintiff also argues in her memoranda that the defendants treated the lease and maintenance as "two distinct products when it became apparent that AT&T was unable to assume quality control over repairs, which contradicts defendants motion." Plaintiff's Response (AT&T) at 11. This does not "contradict" the claim that only one product

is a issue; it is only a further assertion by plaintiff that defendants breached the service aspects of the unified lease agreement. Plaintiff's claim under the Sherman Act is dismissed with prejudice.

2. Antitrust (Robinson-Patman Act)-Count VII

Plaintiff alleges that defendants' "unfair and injurious pricing tactics" violate the Robinson-Patman Act, 15 U.S.C., Sec. 13. However, her complaint fails (End of Page 5) to state a claim under that statute. As to discriminatory pricing for the switchboard leases, the robinson-Patman act applies only to "sales" of commodities, not to "leases". Diehl & Sons v. Int'l Harvester Co., 426 F. Supp. 110, 123 (S.D.N.Y. 1976). Further the allegation of disparate pricing for maintenance services is unavailable because the Robinson-Patman Act applies only to "commodities of like grade and quality." 15 U.S.C., Sec. 13(a). Services such as those provided to repair equipment are "intangible" goods are are not covered by the Act. Ball Memorial Hospital, Inc. 784 F.2d 1325, 1340

(th Cir. 1986); Blount Financial Services v. Walter E. H eller & Co., 632 F.Supp. 240, 243 (E.D. Tenn. 1986)

Plaintiff's assertion in her response that defendants did sell obsolete switchboard equipment pursuant to discriinatory pricing schemes does not advance her effort to state a claim. Plaintiff has never alleged that she purchased any equipment from either defendant, and therefore has no standing to complain of price discrimination. Windy city Circulating Co., Inc. v. Charles Levy Circulating Co., Inc., 550 F. Supp. 960, 966 (N.D. Ill. 1982).

3. Lanham Act

Count VI recites allegations under the "Lanham Anti Trust Act" (sic). Plaintiff complains of the defendants' "false and misleading representations as to both service and maintenance" (Count VI at Para. 18 and their use of "monopolistic control to deceive (their) subscribers as to work performed" (Id. at Para. 19). Because plaintiff has alleged antitrust violations in two other counts in the complaint, we assume that in this count she is trying to state a claim under section

43(a) of the Lanham Act, 15 U.S.C., Sec. 1125(a), which prohibits false descriptions and markings in advertising and trademarks. Yet the Lanham Act (End of Page 6) provides remedies only for business competitors, not for consumers or members of the general public alleging victimization by unscrupulous commercial conduct. In re Agent Orange Product Liability Litigation, 475 F.Supp. 928, 934 (E.D.N.Y. 1979) Leblanc v. Spector, 378 F. Supp. 301 (D.Conn. 1973)

Plaintiff attempts to completely restate her claim in her responsive memorandum, arguing that her telephone answering service "competes" with AT&T'S telephone answering machines "which perform the same duties that plaintiff's business performs manually." Plaintiff's Response (AT&T) at 21. Even if we assumed that competition did exist on this basis, plaintiff still has failed to state a Lanham Act claim, as she has failed to allege that the deceptive actions of the defendants caused confusion among purchasers leading to a diversion of sales from plaintiff to

defendants. Gimix, inc. v. JS&A Group, Inc., 699 F.2d 901, 908 (th Cir. 1983). count VI is dismissed with prejudice.

4. FTC Act

Plaintiff alleges in Count VII that defendants "are guilty of a series of violations of the Federal Trade Commission Act in forcing and coercing payments from plaintiff through illegal and unlawful tactics." Count VIII at Para.22. She even details five instances of malicious and "threatening" behavior by the defendants intended to disrupt her business and compel payments. Id. at Para. 22(a-e) There is no right of action available to private plaintiffs under the FTC Act, 15 U.S.C. Sec. 45 et seq. Moore v. new York Cotton Exchange, 270 U.S. 593, 603 (1926); Akers v. Bonifasi, 629 F.Supp. 1212, 1221 (M.D. Tenn. 1984). Plaintiff's attempt in her response to allege racial discrimination and to "apply" various civil rights statutes "to this section" does nothing to change the fact that Congress vested (End of Page 7) exclusive remedial

power under the FTC Act in the Commission. Count VIII is dismissed with prejudice.

5 Fourteenth Amendment

In Count X, plaintiff alleges that defendants "showed disparity racially" in failing to properly service her equipment and in quoting prices. Plaintiff claims that this behavior and defendants' interference" with her right to contract amounts to a violation of her rights under the Fourteenth Amendment. Count X at Para. 51. Defendants argue correctly in their motions that the fourteenth Amendment does not govern private action and that the status of AT&T-IS and Bell as publicly regulated companies does not convert their actions into "state action" for purposes of the Fourteenth Amendment. Jackson v. Metropolitan Edison Co., 419 U.S., 345, 350 (1974).

Plaintiff responds by attempting to formulate another new basis for this use of action, stating that her discrimination claims are "based on constitutional guarantees under the Thirteenth and Fourteenth Amendments" as

well as the federal civil rights statutes--42 U.S.C. Sec. 1981,1982, 1983 and 1985(c). Putting aside the fact that plaintiff is again try-ing to cure pleading defects through her memorandum in oppostion, the new allegations are still insufficient to state a claim. Plaintiff has not alleged that defendants were acting "under color of state law" and therefore has not stated a claim under section 1983. Papatropolos v. Milwaukee Transport Services, 795 F.2d 591, 595 (7th Cir. 1986). As to the other statutes, the allegations on the whole are notably lacking the minimal detail needed to support a claim under the civil rights statutes, as plaintiff states that racial discrimination was present "(i)n dozens of (end of Page 8) separate instances plaintiff found too numerous to detail in a notice-type pleading allowed by the Federal Courts, and which will be presented through adequate discovery and at the trial...." Plaintiff's Response (AT&T) at 37. Plaintiff has alleged no facts to suggest that the

racial animus on the part of the defendants; rather, she states that her rights were infringed "many times" by the defendants, who alter their policies "where race and/or hispanic origin come into play." Her attempts in the responsive memoranda to describe instnces of racially motivated actions by the defendants are conclusory and unsupported by facts. Plaintiff's Response AT&T) at 37-39.

However, we acknowledge that it is at least conceivable that plaintiff might be able to state a claim against the defendants under either section 1981 or 1982, which do not require an allegation of :"state action." Runyon v. McCrary, 427 U.S. 160, 168-74 (1976). we will therefore give plaintiff leave to amend her complaint to state a claim under either or both of these sections. To sue under section 1981, a plaintiff must allege racial discrimination in one of four enumerated activities: making and enforcing contracts; suing in court and giving evidence; securing all benefits of law (e.g., welfare benefits, road access);and receiving punishment,

licenses, taxes and penalties. Brown v. Federa tion of State Medical Boards of the United States, No. 82 C 7398, Memorandum Op. at 11 (N.D. Ill. May 31, 1985) (Grady, J) We 11 (N.D. Ill. may 31, 1983) (Grady, J.) We gather from the material submitted that plaintiff believes her race was a factor in defendants' refusals to sell equipment to her and disrupting her attempts to contract with clients and other answering (End of Page 9) services. Plaintiff's Response (AT&T-IS) at 37-38. This conduct could also possibly be sufficient grounds to state a claim under Section 1982, which gives all citizens of the United States the same right "as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

In granting plaintiff leave to amend, we caution her that she should amend the claim only if she can provide a sufficient factual and legal basis for doing so. She must allege (1) intent to discriminate against her because of race; (2) subsequent injury; and (3) nexus

between defendants' conduct and a right to contract (section 1981) or sell or lease property (section 1982). Brown, Memorandum Op. at 13. As noted in our assessment of her present allegations, she must not simply recite that defendants did discriminate against her and injure her, but she must also provide us with the operative facts--examples of the defendants' conduct--that support these claims. Rodgers v. Lincoln Towing Service, 771 F.2d 194, 198 (7th Cir. 1985). We remind plaintiff that any amended filing that does not meet these minimal requirements may subject her to sanctions under Federal of Civil Procedure 11.

6. RICO

Count IX of the Complaint purports to state a claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C., Sec. 1961 et seq. ("RICO"). Plaintiff incorporates the allegations of the first eight counts of the complaint into this count and states that "(d)efendants used a pattern of racketeering

activity in collection of an unlawful debt on numerous occasions as set forth (in those allegations)." Count IX at p= Para. 46(a).

(End of Page 10)

In order to plead a RICO violation a plaintiff must allege that the defendant received income, maintained interest in an enterprise, or conducted an enterprise "through a pattern of racketeering activity or the collection of an unlawful debt." 18 U.S.C., Sec. 1962(a-c). An "act of racketeering activity" is defined to be one of certain enumerated federal crimes found in 18 U.S.C., Sec. 1961(1), and a "pattern" means "at least two acts" of that activity under section 1961(5). Sedima, S.P.R.L. v, Imrex Co., Inc., 473 ;U.S. 479, 496 n.14 (1985)

The allegations of the first eight counts, incorporated as paragraphs 1-45 of Count IX, do not include any of the federal offenses enumerated in section 1961(1). Nor can plaintiff's claim that defendants engaged in "the collection of an unlawful debt" support her RICO claim, as section 1961(6) defines

"unlawful debt" support her RICO claim, as section 1961(6) defines "unlawful debt" as that produced by gambling or usurious loans, neither of which must rest on plaintiff's allegations that defendants committed the "predicate acts" of interfering with commerce under the Hobbs Act, 18 U.S.C., Sec. 1951(a), or engaged in extortionate credit transactions in violation of the federal loansharking statute, 18 U.S.C., Sec. 892, 894.

The Hobbs Act makes it a crime to obstruct commerce "by robbery or extortion" or by committing or threatening "physical violence to any person or property in furtherance of a plan" to violate section 1951. The only allegations in the complaint that support the Hobbs Act claims are found in the state law counts, where plaintiff charges that defendants sabotaged the switchboard equ8ipment (Count III, Para. 18(a) and extorted money from her (Count II at Para. 18). However, these bare allegations are not enough to establish a predicate act of

racketeering activity under the Hobbs Act, which defines extortion as obtaining (End of Page 11).property from another with consent "induced by wrongful use or actual or threatened force, violence, or fear or under color of official right." 18 U.S.C., Sec. 1951(b)(1).

Plaintiff nowhere alleges that defendants threatened her with the use of physical force, violence, or their power as officials. We take it that plaintiff is alleging that her fear of economic loss through discontinuation of her phone service and disruption of her business allowed the defendants to take her property from her. Yet to characterize the defendants' "threats" to cut off her phone service as a Hobbs Act violation, in the absence of more detailed allegations of wrongdoing by the defendants, would result in an overly broad application of that statute. "To interpret the word 'fear' in the federal criminal statute prohibiting extortion to cover this kind of conduct would encompass almost any tort causing economic industry

affecting interstate commerce." Flowers v. Continental Grain Co., 775 F.2d 1051, 1053 (8th Cir. 1985). Bell has argued that disconnection of a non-paying customer's service is a legitimate right under the terms of the contractual arrangement. Bell's Reply Memorandum at 7-8 (citing 83 Ill.Adm. Code, Part 735, Sec. 730.130). Plaintiff has simply not stated a predicate act based on the federal extorion statute.

Plaintiff's attempt to create a predicate act on the federal loansharking statute is simimarly unsupported by a factual allegations. To charge a defendant with making "extortionate extensions of credit" under 18 U.S.C., Sec. 892, one must allege an understanding between the creditor and the debtor at the time credit is extended that delay in repayment "could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C., Sec. 891(6). Even if plaintiff had alleged that credit was extended

(End of Page 12) to her by defendants, she

certainly has not claimed that "violence or other criminal means would be used to harm her or her property."

Even if we took the new allegations of the plaintiff's response into account, she has not stated the existence of the two "predicate acts" required by RICO. The gist ofher response is that the defendants "systematically mailed to plaintiff independent billings, invoices, threatening notices and collection notices at the rate of two or three per month, each month,over the years in question" and that "plaintiff was barraged with thousands of pieces of correspondence designed to intimidate andharass plaintiff into complying with defendant's terms..." Plaintiff's Response (AT&T-IS) at 26. Even assuming that plaintiff could adequately allege the elements of mail fraud under 18 U.S.C., Sec.1341, we do not think that she can allege the requisite "pattern" of racketeering activity. Where predicate acts all related to the same transaction, the acts do not support the

continuity aspect of the continuity aspect of the pattern of racketeering activity. As we noted previously, this is essentially an action for breach of contract, and the mailings plaintiff complains of relate to that single,isolated contractual relationship for the lease of the switchboards. As in Elliott, all the alleged predicate acts related to the one attempt to get plaintiff to pay her account or otherwise solve the problems between the contracting parties. there is a single "scheme" and victim in this case, and we conclude that the "continuity" aspect of the pattern requirement has not and cannot be met. See also Analysts Int'l Corp. v. Recycled Paper Products, Inc. No.85 C 8637 (End of P.13) Memorandum Op. at 17-18 N.D. Ill. June 19, 1987) (Grady, J.). Count IX is dismissed with prejudice.

Federal Jurisdiction

We now turn to the questions of whether we should exercise over plaintiff's state law claims (Counts I and IV). Diversity

jurisdiction is not available, as both plaintiff and Bell are citizens of illinois and complete diversity of the parties is lacking under 28 U.S.C., Sec.1332(a). Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806);Kanzelberger v.Kanzelberger , 782 F.2d 774, 776 (7th Cir. 1985). Ordinarily, diversity jurisdiction may be salvaged by the dismissal of non-diverse parties. Stockman v. LaCroix, 790 F.2d 584, 587 (7th Cir. 1986). Here,however, plaintiff has described Bell as an "indispensible party" to this case (Plaintiff's Response (Bell) at 6, so diversity jurisdiction will not be possible.

The other possibility is pendent jurisdiction. If plaintiff is unable to file an amended section 1981 claim, it is clear that we should not keep the case. "Certainly, ifthe federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." Gibbs v. United Mine Workers, 383 U.S. 715, 716 (1966).

However, if plaintiff does not state a federal claim, we may exercise pendent jurisdiction if the state and federal claims share a "common nucleus of operative fact." Gibbs, 383 U.S. 725. We reserve judgment on this issue pending any effort by plaintiff to amend her complaint.[6] (End of Page 14)

CONCLUSION

Counts V-XI of the complaint are dismissed for failure to state a claim under Rule 12(b)(6). counts I-IV are dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). Plaintiff is given leave to file an amended complaint alleging race discrimination under 42U.S.C., Sec. 1981 or 1982. We recommend to plaintiff, however, that in deciding whether to file such an amendment she give consideration to the requirements of Rule 11, Federal Rules of Civil Procedure.

Dated: July 31, 1987

ENTER: ss/JOHN F. GRADY

UNITED STATES
DISTRICT JUDGE

FOOTNOTES

1. The attempts to name the appropriate defendants in this case are marked by confusion. The original complaint named "American Telephone and Telegraph Information Systems, a/k/a AT&T, a foreign/New York corporation." Defendants' counsel appeared on behalf of "AT&T Information Systems,Inc." Plaintiff moved to amend her complaint more than a year after it was filed to name a different party, American Telephone & Telegraph Information Systems, Inc., a/k/a AT&T Information Systems, a Delaware Corporation. Counsel has since filed an appearance on behalf of "American Telephone & Telegraph company," and moved for dismissal on behalf of that defendant. This opinion applies to both AT&T Information Systems, Inc." and "American Telephone & Telegraph Company," names that differ slightly from those used by the plaintiff. (END OF PG. 15)

2. Count XI is a general request for injunctive relief restraining defendants from interrupting plaintiff's service and changing her rates. As we have determined that plaintiff has stated no cause of action under federal law and that we have no jurisdiction over her state law claims, we must dismiss this count as well.

3. Bell's Motion for Summary Judgment includes supporting factual material in the form of affidavits of Bell personnel. These statements related primarily to the state claims set forth by plaintiff and Bell's role in the contractual relationship. Because we have no jurisdiction over these state claims and the federal claims fail to state a cause of action, we donot rely on this material in our decision.

Plaintiff claims that AT&T-IS waived its right to file a motion to dismiss under rule 12(b)(6) because AT&T-IS filed an answer and affirmative defense to the complaint.However,

under Rule 12(h)(2), AT&T-IS retains the right to file a Rule 12(b)(6) motion to dismiss if the issues raised in the motion were raised as defenses in the answer. Westland v. Sero of New Haven, Inc., 601 F.Supp. 163, 163 (N.d. Ill. 1985) the "Third Separate Defense" of AT&T-IS is that the "Complaint and Amended complaint fail to state a claim upon which relief may be granted." Answer at 33. AT&T-IS has therefore preserved its right to move for dismissal under Rule 12(b)(6).

4. We recognize that plaintiff isproceeding pro se and we read her complaint liberally in order to determine whether she has stated a claim. Haines v. Kerner, 404 U.S. 519, 520-21 (1971); Fitzmaurice v. Local 712, Int'l Brotherhood of Teamsters, No. 84 C 9197, Memorandum Op. at 4. To this end, we assess the new allegations made in her responsive memoranda throughout this opinion even though they are not technically before us on this motion to dismiss. Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194, 198 (7th Cir. 1985)

5. Plaintiff's responses to the motions of Bell and AT&T-IS, although paginated differently, feature essentially idential texts. We will refer to both as "Plaintiff's Response" and will identify the particular defendant addressed in parentheses.

6. We emphasize for plaintiff's information that we have given no consideration to the merits ofher state law claims, and add that dismissal for lack of jurisdiction by a federal court gives an Illinois plaintiff one year afterthe date of this opinion to refile the claim in state court even though the statute of limitations may have run out during the pendency of the action in the federal court. Ill. Rev. Stat., ch. 110, Para. 13-217; see Anderson v. Illinois Tool Works, No. 82 C 72-7, Memorandum Op. at 15 (N.D. Ill. Jan. 8, 1987) (Grady, J.)

(End of Page 16)

END OF MEMORANDUM OPINION

APPENDIX 6 (P. 28)

Petitioner's Footnotes

2/

a. Petitioner requests the Court to note that she has never waived her Seventh Amendment right to jury trial with respect to this Civil action, and that Jury Demand was noted and filed on each of Complaint(s) filed (NR-1, 3, and 103). Petitioner believed this case would be heard by Jury rather that Judge on an equivalent "bench trial" with Memorandum Opinion.

b. District Court Order of July 6, 1987 stayed all discovery pending court's rulingon Respondents' Motion to Dismiss and Motion for Summary Judgment.(NR-98) Therefore, no adequate discovery could be taken by Petitioner regarding AT&T (New York) since they were not legally before the court until they filed their Appearance on July 22, 1987 (NR-117-121), after the July 6 Order and after this Appeal was instituted on July 14, 1987 in the Seventh Circuit. Documents deposited with court for purposes of this Appeal on October 5, 1987 was not granted until September23, 1987, after this appeal instituted. Therefore, Memorandum Opinion was not able to base its facts (the Court's version in which Petitioner disagrees with) on documents supplied by Respondent, AT&T (New York).

c. As of the preparation of this Appeal Brief (Petition), Petitioner is presently receiving invoices on leases and on purchases by AT&T and AT&T-IS, and substantial other documents which would ordinarily be used as evidence in a trial, and which have not been presented to the District Court to evaluate impartially in basing its opinions as set forth in the July 31, 1987 Memo. Op. In addition, Petitioner is presently receiving invoices and making payments to BELL for services not received and at issue not covered in the Memo.Op.

Petitioner's Footnotes

d. Petitioner's Complaint(s), motions, and petitioners give several instances in which various representations were made to Petitioner over a six year period, all representations being challenged by Petitioner who relied on the information, even those contradictions. Counts I-IV have allegations of misrepresentations, fraud, deceit and duress, again evidentiary material which could have been brought out more fully if discovery had not been hampered (NR-98), or as questions for a jury.

e. The Memo. Op. claiming that Petitioner's allegations on race as being "conclusionary and unsupported by facts" is without foundation or merit, since these again, are fact questions for a jury. Those few instances in which Petitioner pointed out race as factor were ignored by Court;(a) NR-31-34, Respondents referring Petitioners' clients to their own clientele along racial lines; and (b) NR-87,88,89 wherein the two contracts were cancelled by Respondents upon learning of sales to Petitioner. Again, this is evidence and not required to be pleaded in a notice-type pleading.

The factual information as to Respondents' treatment of minority businesses, particularly answering services and companies requiring switchboard systems similar to Petitioner's, were voluntarily supplied to Petitioner prior to litigation and reinforced by attorneys Sidley & Austin "inadvertently" providing Petitioner with written documentation to confirm the disparity rate schedules, billing and pricing, detailing racial policy and procedures, types of equipment, billing procedure,andracial and ethnic background of its own clients,legal negotiations and other confidentialities -- without investigating Petitioner's racial or ethnic background during phone and mail communications prior to providing the material. Upon being made aware of this, Sidley & Austin successfully stopped discovery. (NR-98)

APPENDIX 7

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT, EASTERN DIVISION

TORRES V. BELL, AT&T and AT&T-IS 86 C 1718

MINUTE ORDER - JUDGE GRADY - AUGUST 3, 1987

MOTION

Court's Motion

ORDER

The Memorandum Opinion of July 31, 1987, plaintiff was given leave to file an amended complaint. That amended complaint shall be filed on or before September 3, 1987.

(Docketed August 4, 1987)

NR-138

3/ **This order is in conflict with District Court's Order in Memo.Op., Footnote 6, granting Petioner 1 year from July 31, 1987 to file Amended Complaint;**

APPENDIX 8

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT, EASTERN DIVISION

TORRES V. BELL, AT&T & AT&T-IS 86-C-1718

MINUTE ORDER JUDGE GRADY, SEPTEMBER 23, 1987

MOTION

Defendant AT&T Information Systems Inc. Motion to Dismiss Cause with Prejudice.

ORDER

The Court hereby dismisses plaintiff's race discrimination claim (Count 10) with prejudice because of plaintiff's statement that she wishes the Court to enter whatever order is necessary to be entered to make the dismissals of the other counts final and appealable.

NR-159

E X H I B I T S

Table of Contents

1. Certificate of Incorporation (Illinois): AMERICAN TELEPHONE & TELEGRAPH CO., INC. (a New York Corporation)
2. Certificate of Incorporation (Illinois): AT&T INFORMATION SYSTEMS, INC. (a Delaware Corporation)
3. Affidavit of Compliance-District Court by Attorney Pamela Hanebutt July 22, 1987

3(a) Affidavit of Compliance-District Court by Attorney Frederic J. Artwick-July 22, 1987

4. Appearances - District Court - July 22, 1987 by Attorneys Hanebutt & Artwick
5. Appearance - Seventh Circuit re 87-8125 by Attorneys Hanebutt and Artwick

5(a) Certificate of Interest re 87-2125 for AT&T INFORMATION SYSTEMS, INC.

6. Respondent AT&T-INFORMATION SYSTEMS, INC., "Answer" to Amended Complaint of April 11, 1986 , Page 2 & 3, No.4
7. Respondents' List of Minority Answering Services, Equipment Status

EXHIBIT 1
(CERTIFICATE OF INCORPORATION)

File Number 0015 788-1

STATE OF ILLINOIS
OFFICE OF THE SECRETARY OF STATE

To all to whom these presents shall come, Greeting:

I, Jim Edgar, Secretary of State of the State of Illinois, do hereby certify that AMERICAN TELEPHONE & TELEGRAPH COMPANY, INCORPORATED in the State of New York and licensed to transact business in this State on January 30, 1899 appears to have complied with all the provisions of the Business Corporation Act of this State relating to the filing of Annual Reports and payment of Franchise Taxes, and is at this time a foreign corporation in good standing and authorized to transact business in the state of Illinois.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois this 3rd day of june, 1986.

ss/Jim Edgar,Sec.of State

1/ See Section 9 of Brief for numerous other identities represented to Petitioner under EX. 1 and 2.

EXHIBIT 2
(CERTIFICATE OF INCORPORATION)

File Number 5277-567-1

STATE OF ILLINOIS

OFFICE OF THE SECRETARY OF STATE

To all to whom these presents shall come, Greeting:

I, Jim Edgar, Secretary of State of the State of Illinois, do hereby certify that according to the records of this office AT&T Information Systems, Inc., a Delaware Corporationlicensed to transact business in this State on June 25, 1982, has failed to file an annual report and pay franchise taxes for 1986. Therefore, has failed to comply with the provisions of the Business Corporation Act of this State. Therefore the Corporation is not in good standing as of this date***AT&T Information Systems, Inc. adopted the assumed name of AT&T CONSUMER SALES AND SERVICE COMPANY on February 8, 1984 and this name was involuntarily cancelled on November 1, 1985.

In Testimony Whereof,I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois this 3rd day of June, 1986.

(SEAL) ss/Jim Edgar

EXHIBIT 3

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

ROSEE TORRES, Plaintiff

-vs- NO. 86C1718

ILLINOIS BELL TELEPHONE CO., et al, Defendants

AFFIDAVIT OF COMPLIANCE WITH GENERAL RULE 39

PAMELA R. HANEBUTT, Affiant is the attorney of record for AMERICAN TELEPHONE & TELEGRAPH COMPANY and has knowledge of the matters covered by this affidavit and has read General Rule 39.

(Body of Affidavit Not Included- See NR-118)

ss/Pamela Hanebutt

Affiant

Subscribed and sworn to before me this 22nd day of July, A.D., 1987.

ss/Lynn A. Kissel

Notary Public

2/ Note; Original Respondent served April 18, 1987 ;under AMERICAN TELEPHONE & TELEGRAPH INFORMATION SYSTEMS (not Inc.) a/k/a AT&T, a New York Corporation(See EX. 1) per NR-4. This Affidavit filed after Appeal process,without leave of court,under name variation (See Section 9 of Brief)

EXHIBIT 3(a)

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

ROSEE TORRES, Plaintiff

-vs-

ILLINOIS BELL TELEPHONE CO., et al, Defendants

AFFIDAVIT OF COMPLIANCE WITH GENERAL RULE 39

FREDERIC J. ARTWICK, Affiant is one of the attorneys of record for AMERICAN TELEPHONE & TELEGRAPH COMPANY and has knowledge of the matters covered by this affidavit and has read General Rule 39.

(Body of Affidavit not Included

See NR-119)

ss/Frederic J. Artwick

Affiant

Subscribed and sworn to before me this 22nd day of July, 1987.

ss/Lynn A/ Kissell

Notary Public

3/ See Petitioner's Footnote 2 on Exhibit 3.

EXHIBIT 4

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT, EASTERN DIVISION

ROSEE TORRES, Plaintiff

-vs- **NO. 86 C 1718**

ILLINOIS BELL TELEPHONE CO., ETAL, Defendants

APPEARANCES ARE HEREBY FILED BY THE UNDERSIGNED AS ATTORNEY(S) FOR: AMERICAN TELEPHONE & TELEGRAPH COMPANY. (Filed 7/22/87)

SS/Pamela Hanebutt

SS/FREDERIC J. ARTWICK

SIDLEY & AUSTIN
One first Nat'l Plaza

Chicago, Illinois 60603

(312) 853-7000

4/ Appearance filed in conjunction with Affidavit of Compliance for Respondent (EX. 1); See NR-117. Filed July 22, 1987. See this EX.6 for acknowledgement of service (NR-20) April 18, 1986, identifying AT&T (New York) as Respondent.

EXHIBIT 5

APPEARANCE FORM

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Case No. 87-2125

ROSEE TORRES, ETC. , Plaintiff-Appellant

-vs-

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, INC.and AMERICAN TELEPHONE AND AMERICAN TELEPHONE AND TELEGRAPH INFORMATION SYSTEMS, INC., a/k/a AT&T INFORMATION SYSTEMS, a Delaware Corporation

The Clerk will enter appearance as counsel for AT&T Information Systems, Inc.

ss/Frederic J. Artwick

ss/Pamela R. Hanebutt

Docketed July 16, 1987

EXHIBIT 5(a)

CERTIFICATE OF INTEREST

Case no. 87-2125

Short Title: Torres v. Illinois Bell Telephone Co., et al

To enable the judges to determine whether recusal is necessry or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a certificate of interest stating the following information:

1. The full name of every party or amicus the attorney represents in the case: AT&T INFORMATION SYSTEMS, INC.

2) If such party or amicus is a corporation: (i) Its parent corporation, if any: AMERICAN TELEPHONE & TELEGRAPH COMPANY (ii) A list of its stockholders which are publicly held companies owing 10% or more of the stock in the party or amicus: AMERICAN TELEPHONE & TELEGRAPH COMPANY

3) The names of all law firms whose partners or associates have appeared for the party in the district court or are expected to appear for the party in this Court:

This certificate shall be filed with the appearance form or upon the filing of a motion in this court , whichever occurs first. The text of the certificate (i.e., caption omitted) shall also be included in front of the table of contents of the party's main brief.

Attorney's Signature: ss/Frederic J. Artwick

Date: July 22, 1987

5/ Petitioner is unable to determine how the docket sheet indicates filing Certificate of Interest on July 16, 1987 for 87-2125, while signature on Certificate is signed as of July 22, 1987. Petitioner also challeges in Brief AT&T-IS and AT&T-IS (Delaware) standing to Circuit to dismiss AT&T (New York) in 87-2125 and 87-8042 without the latter having filed its own Appearance and Affidavit in its own behalf, although the Seventh Circuit allowed it.

EXHIBIT 6

ANSWER TO PETITIONER'S AMENDED COMPLAINT
(NR-20)

Filed May 23, 1987:

"Defendant AT&T Information Systems, Inc.,("AT&T-IS"), by counsel, responds to the Complaint and Amended Complaint of Rosee Torres insofar as it is directed to an entity known as American Telephone and Telegraph Information Systems as follows:

No. 4: Answer

AT&T-IS denies the allegations of paragraph 4 except as expresly admitted herein. AT&T-IS admits that American Telephone & Telegraph Company ("AT&T") is a New York Corporation which is authorized to do business in Illinois and that AT&T'S registered agent in Illinois at the time the complaint was filed was John s. Van Der Motter, One South Wacker Drive, Chicago, Illinois 60606. Further, answering, AT&T-IS denies that AT&T is properly named as a defendant in this action. AT&T has never owned or leased the switchboards which are the subject of the Complaint and Amended Complaint. AT&T-IS has owned the switchboards since January 1, 1984."

EXHIBIT 7

PARTIAL LIST OF ATTORNEY-CLIENT PRIVILEGED INFORMATION: AT&T ATTORNEY VICTORIA BUSH/AT&T-IS ATTORNEYS SIDLEY & AUSTIN & BELL RE MINORITY TELEPHONE ANSWERING SERVICES RE MINORITY (BUSINESSES) TELEPHONE ANSWERING SERVICES, EQUIPMENT STATUS & PRICE DIFFERENTIATION DOCUMENT: NR-130,NR-162-168,NO. 8, (Discovery Deposited 10/5/87)

BUSH: Verify AT&T INFO & BELL - do not Disclose Levin (Hall) Torres file

1981-82	ANNEX(30) To General	Greenberg/Cordova(Mex) Non-AT&T Eqpmt
1982 2 Yrs	COMMON COURTESY (2) To General	(Blk)
1985	HELLO	(Blk) AT&T Eqpt. Out
1985 20 Yrs	HYDE PARK (2)	(Blk) AT&T Eqpt Out
Present 10 Yrs	HALL'S BUSINESS (1)	(Blk)AT&T Eqpt. Dispute -
Present 5 Yrs	ATTYS HELPER (1) Torres	(Blk/Mex) AT&T Eqpt.-Dispute
Present 16 Yrs	LEGAL SEC.(1) Torres	(Blk/Mex) AT&T Eqpt.-Dispute
Present 5 Yrs	DOCTORS HELPER (1) Torres	(Blk/Mex) AT&T EQPT.-Dispute
Present 10 Yrs	TELEPHONE SEC.(1) Torres	(Blk/Mex) AT&T EQPT.-Dispute
Present 25 Yrs	GARLAND(2) Purchased AT&T	Andriotti (Ital)[W] $2,000
1985	CHICAGO TEMPLE	Contract w/Torres [W] AT&T Eqpt. - Out
1986	221 N.LaSalle	Contract w/Torres[W] AT&T Eqpt - Want to sell